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requires it, and it is to be presumed that the law has been obeyed. In respect to a foreign judgment, nothing can safely be taken for granted, and the Practice Book has therefore provided a different form of complaint.

"The Practice Act was designed to simplify our legal precedure, and to abbreviate pleadings by the omission of all unnecessary allegations. The demurrer to the complaint, on the ground that it did not allege that the High Court of Justice, Queen's Bench Division, Birmingham District Registry, had jurisdiction of the action, or of the parties, or of the subject-matter, nor that the defendant had notice of its pendency, or was summoned to appear, was therefore properly overruled. These facts were the indispensable conditions of a due adjudication by the foreign court; and whatever is necessarily implied is sufficiently pleaded. Nor was it cause of demurrer that the complaint did not state that any hearing or trial was had. The averment as to a due adjudication implied that there was a fair opportunity for hearing; and that the defendant could not complain that he did not avail himself of it."

See also *Wakelee v. Davis*, 50 Fed. 522, 523, (1892) where, expressly referring to *Galpin v. Page* (1873) and *Wilbur v. Abbott* (1880), and following *Brownell v. Greenwich*, it was said: "But in the eleventh and twenty-third paragraphs the plaintiff alleges that said judgment was duly given, made and entered by said District court, which, inasmuch as the defendant was shown to be a non-resident, was a proper and apparently necessary averment. * * * The averment that the judgment was duly entered was a sufficient statement of the facts, under the New York practice, to impliedly allege jurisdiction. * * * The denial by the defendant of this allegation raises an issue of fact in regard to the existence of jurisdictional facts."

The plaintiff in the case at bar alleges with far more directness the matters which the court in the New York and Connecticut cases held to have been averred by necessary implication in the expression "duly adjudged."

One other argument advanced against the second count, is that the cause of action in the New Zealand court was joint and not joint and several, that only a joint judgment against all the defendants before that tribunal could have been correctly rendered, and that the judgment, inasmuch as it was not against *all* of the defendants jointly, is void upon its face. This, if erroneous at all, was a mere irregularity and not matter affecting the jurisdiction of the court, and therefore not now open to review.

2. It does not appear from the face of the declaration that the judgment of the New Zealand court was based upon the same original cause of action which is stated in the first count herein. Assuming that that judgment arose out of an entirely distinct transaction between the parties and that therefore the present declaration sets out beyond any question two causes of action, the second ground of demurrer cannot be sustained. Section 1259 of the Civil Laws of 1897 provides: "The plaintiff in a civil suit may unite several causes of action in the same complaint, when they all arise out of: 1. contracts, express or implied; or" * * * (six other classes of actions are here named). "But the causes of action so united shall all belong to one only of these classes, and shall affect all the parties to the action, and shall be separately stated." In our opinion an action on a judgment is, within the meaning of this statute, an action *ex contractu*, i. e., on the promise or contract implied by law to pay the amount of the judgment. 1 Encycl. Pl. & Prac. 193; 1 Chitty Cont. 23; 1 Parsons Cont. 7; 2 Bl. Com. 465; Freeman on Judgments (3rd Edition), §217; 2 Black on Judgments, §848; *Johnson v. Butler*, 2 Ia. 535; *Moore v. Nowell*, 94 N. C. 270, 271; *Stuart v. Lander*, 16 Cal. 373, 375; *Childs v. The Harris Mf'g. Co.*, 68 Wis. 232, 233. The first count is on an express contract, hence there is no misjoinder.

Defendants contend, however, that it sufficiently appears by inference from the averments of the declaration, and the plaintiff during the argument in this Court stated the fact to be, that the New Zealand judgment was rendered on the same cause of action now declared on in the first count. Even upon these facts the two counts have not been improperly joined. The plaintiff has simply stated his case in two different forms, and for the same reasons, no doubt, which ordinarily lead plaintiffs to allege two or more different counts describing the cause of action, e. g., because of uncertainty as to whether or not one or the other of the counts is capable of proof. He can, of course, and expects to recover on one only. The tendency of courts at present is to regard the judgments of foreign courts of record as being just as conclusive between the parties as those of domestic courts of record, and there seems to be, in this view, no good reason for holding that the original cause is not merged in a foreign judgment while holding that there is such merger in the case of a domestic judgment. In neither instance, it scarcely need be noted, would there be any merger if the judgment was for any reason void, as, for example, for lack of jurisdiction in the court rendering the same, for such an alleged judgment would in fact not be a judgment at all. While, therefore, it may appear to be inconsistent for the plaintiff to aver both the agreement and the judgment, that consideration alone will not prevent the joinder of the counts. At common law inconsistent counts could be joined, and it is only by statute in some states that the procedure is prohibited. It is not uncommon to find in the same declaration two or more counts which are, strictly speaking, inconsistent and which cannot all be true at the same time; but the practice is well established and is, moreover, founded on good reasons. In the case at bar, if plaintiff fails to prove the jurisdiction of the New Zealand court, the position will be that the original cause of action will stand intact for lack of a valid judgment to absorb it; on the other hand, if he does prove the former judgment to be valid and binding against these defendants, he will recover on that and the original cause will be deemed merged. The apparent inconsistency will have disappeared.

It would serve no good purpose to compel the plaintiff to bring an action first on the judgment and then, if that fails of proof, to bring a new action on the agreement. It is no hardship to the defendants to have both phases of the controversy disposed of in one action and it will further the ends of justice to permit this course to be followed.

See 5 Encycl. Pl. & Pr. 319, 321; *Barton v. Gray*, 48 Mich. 166, 167; *Walsh v. Kattenburgh*, 8 Minn. 101, 102; *Snyder v. Snyder*, 25 Ind. 401, 402.

1. Non-joinder of parties defendant. Four or five persons other than those named as defendants in this action, were members of "the Company" and parties of the first part to the agreement sued on in the first count. The judgment declared on in the second count was rendered against three persons other than the present defendants. Is there a defect of parties defendant?

The agreement sued on (quoting from it) "witnesseth: for and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated;" and then goes on to specify the details of the contract. As we construe this clause, it is in effect as though the language used had been, that for the consideration stated "the parties of the first part do hereby, jointly and severally, make, with the parties of the second part, the following agreement of partnership." The contract made in the opening clause by the parties of the first part is joint and several, and the contract made is that the details of which are specified in the subsequent clauses. If paragraph 4 stood entirely by itself, it would probably be construed to mean that the members of "the Company" jointly were liable for the promise there set forth to give the prison certain stock upon the happening of a certain contingency. The paragraph, however, cannot, we think, be read by itself, but must be read in connection with the opening sentence of the clause quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the part of the members of the company. This is the construction strongly contended for by the plaintiff himself.

Turning to our statutes, Section 1222 of the Civil Laws of 1897 provides: "It shall be necessary to join as defendants in a civil action *all the* joint and several, or joint makers of promissory notes, or drawers of drafts, bills of exchange or orders, *joint and several* obligors, lessees, or *parties of the first or part to* covenants, *agreements* and contracts, in suing for non-payment, non-acceptance, or non-fulfillment thereof, but it shall in no case be necessary to serve all the joint parties sued with process. Service of process upon one of several defendants, as by law, shall be legal service upon all for the purpose of appearance in court, and judgment may be entered against all such defendants thereon; provided, however, that no execution shall issue against the sole property of any joint defendant on whom process was not duly served as aforesaid." Clearly the mandatory language of this statute renders it necessary for the plaintiff to join as defendants all of the parties of the first part to the agreement sued on in the first count. It is, however, contended that the statute must be read as subject to an implied exception in the case of parties out of the jurisdiction of the court, on the ground that the statute is only declaratory of the common law rule on the subject and that at common law the exception existed. If the exception referred to existed at common law, it is unnecessary to say on this point whether it did or not, and if the statutory provision is to be construed as subject to the same exception, it can only be on the theory that the Legislature therein intended merely to declare the common law on the subject without modification. That this was not the intention of the Legislature, however, is clear from the fact that under the terms of the statute a plaintiff may recover a judgment against all those jointly liable on a contract without having service upon all of said partners who are resident within the jurisdiction. The latter certainly was not possible at common law. We are of no sufficient reason for declaring the statute subject to the exception contended for.

Judgment debtors are not within any of the classes named in section 1222. They are not "parties of the first or second part to * * * agreements or contracts," that language referring, we think, solely to those who have voluntarily entered into such agreements and not to those upon whom, though unwilling, the law casts an obligation to pay the amount of a judgment duly rendered against them. The requirements of the section, then, as to the joinder of all the parties, do not affect this branch of the case. It is the common law rule that applies. At common law, in an action on a judgment, it was necessary to join as parties all the living judgment debtors excepting those out of the jurisdiction. *U. S. v. Cushman*, 2 Sumner 314; *Gilman v. Rives*, 10 Peters 298, 299, 300; 11 Encyc. & Pr. 1119, 1120. Any expression to the contrary in *Bell v. McIntyre*, 9 Haw. 306, was *obiter dictum*. The common rule, subject to the exception stated, governs in this case, and plaintiff must make all the judgment debtors parties defendant or show an excuse for not doing so.

The New Zealand judgment having been recovered against seven only of the parties of the first part to the agreement, the foregoing decision will, in view of the provision of section 1222 that "the causes of action so united shall * * * affect all the parties to the action" render it impossible, we think, for the plaintiff to join the two counts in one action.

In our opinion, the demurrer was properly sustained upon the first ground, but not upon the other grounds. Accordingly the exceptions are overruled and the case is remanded to the Circuit Court of the First Judicial Circuit for such further proceedings as may be proper not inconsistent with the foregoing view.

Robertson & Wilder for the plaintiff, who also appeared in person.

Magoon & Thompson, Kinney, Ballou & McClanahan and *H. A. Bigelow* for the defendants.